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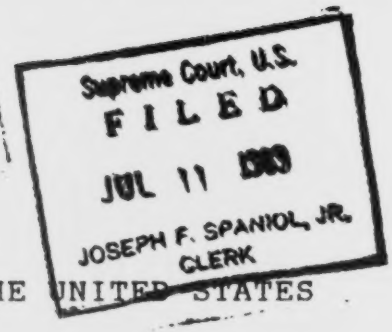

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LORI S. HARDEMAN, petitioner

v.

CHRYSLER CREDIT CORPORATION, respondent

PETITION FOR WRIT OF CERTIORARI TO THE OHIO STATE, BUTLER COUNTY COURT OF APPEALS FOR THE TWELFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the state courts interpret 16 C.F.R. Section 433.2 in a manner contrary to both the language and federal intent, it is only appropriate that the United States Supreme Court step in to set the correct standard.

1. Where a retail installment contract contains a "Preservation of Rights" clause, pursuant to 16 C.F.R. 433.2, the debtor's judgment against the seller of goods under the note can be used as a setoff against the balance owed by the debtor to the assignee of the contract.

2. The debtor's judgment for attorney fees and costs against the seller of goods under the note can be used as a setoff against the balance due to the assignee and when the judgment exceeds the balance due, the debtor will be allowed to recover moneys paid.

PARTIES

Petitioner before this court was plaintiff at trial, Appellant in Appeals Court Respondent Chrysler Credit Corporation was a co-defendant with Wheels Inc., which is not involved in this petition.

Petitioner - Lori Hardeman

Respondent - Chrysler Credit Corporation

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This petition for certiorari arises out of the decision of the Twelfth District Court of Appeals of the State of Ohio, and denial of review by Supreme Court of Ohio. The decision was based on an incorrect interpretation of the important Federal Trade Commission policy and rule which holds the assignee of a contract responsible for all claims and defenses which the debtor may have against the seller of goods when the seller engages in fraud and the buyer is unable to enforce judgment against the seller due to the insolvency of the seller.

OPINIONS BELOW

The trial court opinion of Butler County Court of Common Pleas is unreported. (See Appendix I for complete opinion).

The opinion of the Court of Appeals of Butler County, Twelfth District of Ohio is unreported. (See Appendix II for complete

opinion).

JURISDICTION

Based on the denial of review by the Supreme Court of Ohio on April 12, 1989, the opinion of the intermediate Appellate Court of Butler County in the State of Ohio is brought before you under 28 U.S.C. Section 1257. See Appendix V.

Petitioner asserts that Title 28 U.S.C. Sec. 1257 allows that "final judgments or decrees rendered by the highest court of a state in which a decision could be had, "may be reviewed by the Supreme Court by writ of certiorari where a "right" is claimed under a federal statute." The key phrase is "in which a decision could be had." An appellant must generally exhaust all opportunities for review by the state courts before the Supreme Court will hear a matter. The Supreme Court will not assume that

review by a higher state court would have been denied if the litigant did not attempt to seek such a review. Stratton v. Stratton, 239 U.S. 55 (1915).

Thus if a litigant in a state court is entitled to appeal to a higher state court as a matter of right, he is obligated to do so even if an intermediate state appellate court has denied a motion for leave to appeal or a writ of certiorari was improperly sought and denied. Hammerstein v. Superior Court of California, 341 U.S. 491 (1951).

A case may be brought to the Supreme Court after the highest court in the state has refused to hear an appeal, Michigan Wisconsin Pipe Line Co. v. Califvert, 347 U.S. 157 (1954), or has denied a petition for leave to appeal or for a writ of certiorari. Cohen v. California, 403 U.S. 15 (1971). In such a case the last court

to hear the matter is the highest state court in which a decision could be had, and the appeal is taken from such court to the United States Supreme Court, or the writ of certiorari is directed to that court and not to the higher state court which refused to review the matter. An intermediate appellate court also becomes the highest court in which a decision could be had if the highest court of the state refuses to hear an appeal or grant a writ of certiorari. Largent v. Texas, 318 U.S. 418 (1943).

Section 433.2(A) of the Code of Federal Regulations, Title 16 provides in pertinent part: "In connection with any sale or lease of goods or services to consumers, in or affecting commerce as commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of the Act

for a seller, directly or indirectly to:

> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold free type:
>
> NOTICE
>
> Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof, recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder. (See Appendix VI)

It is the interpretation of the notice which draws this appeal from the Twelfth District Court of Appeals of Ohio into question. The commission has allowed much of the enforcement of its regulations to the independent state courts. Petitioner urges that it is of wide public importance for the United States Supreme Court to finally set a standard for the parameters of this notice.

"All claims and defenses," under the

plain meaning rule, means that all of the claims and all the defenses will be allowed. This means attorney fees, punitive damages, etc. It would lead to an absurd result if petitioner claimed to request the money from respondent in excess of what is owed. That is not the case, Petitioner is only claiming what she should be allowed under the notice, that is, to set off the total judgment ordered against what is owed and receive back what she has already paid.

It would be a continual detrimental blow for all creditors and debtors alike throughout the country to be subject to fifty different interpretations of this notice.

The opportunity is now present to set the standard.

STATEMENT OF THE FACTS

The facts recited by the trial court in

its July 29, 1987 Opinion (See Appendix I) state the facts of the case sufficiently:

> "On April 27, 1985, plaintiff, Hardeman, purchased a car from the defendant Wheels, Inc. The facts as testified to by Hardeman (defendant offered no testimony) were that she agreed to pay the amount stated on the federal "window sticker" $7,559.00. Hardeman also agreed to pay an additional $500.00 for a warranty which Wheels told her she had to pay, and Wheels offered her $3,750.00 on her trade-in as part of the deal.
>
> Hardeman subsequently signed financing papers for the car payments at Wheels. Hardeman stated she was not told the length of, nor terms of, the financing agreement.
>
> Wheels then sold the financing agreement, or retail installment loan, to defendant Chrysler Credit Corp. (Chrysler).
>
> Prior to Hardeman paying her first payment, she discovered several discrepancies between what she and Wheels had agreed upon and what was written into the retail installment loan. She immediately returned to Wheels and told them about the discrepancies which they refused to rectify.
>
> Hardeman, on her own, then through her attorney, tried several

times to solve the problems with Wheels. Chrysler was notified of the problems prior to Hardeman's first payment.

She had discovered that Wheels charged her $9,823.00, which was in excess of the agreed price; that the $500.00 warranty was from a private company and was not necessary because the standard Chrysler warranty covered the car for five years; and that she had received only $3,250.00 for her trade-in.

When negotiations failed to rectify these discrepancies, Hardeman filed suite against Wheels and Chrysler [Credit Corporation].

The remaining issue for the jury was on damages. They found in plaintiff's favor: $5,000.00 in actual damages, $600.00 representing $200.00 statutory damages for each of three CSPA [Consumer Sales Practices Act, R.C.1345] violations, and $750,000.00 in punitive damages."

Defendant Wheels was able to pay only $1,185.00 of the judgment due to insolvency.

STATEMENT OF THE CASE

This case presents novel questions of first impression arising from a finance

contract for the installment sale of a new car between the parties.

This appeal is from the Butler County Court of Appeals, Twelfth Appellate District, Ohio, which upheld the July 29, 1987 and November 10, 1987 opinions and subsequent judgment entries of the Butler County Court of Common Pleas, Ohio. See Appendices I and II.

The complaint was filed in May 1985 alleging breach of contract, violations of the Ohio Consumer Sales Practices Act (hereinafter "Consumer Act"), price gouging in violation of the Ohio Consumer Sales Practices Act and violation of the Advertisement and Sale of Motor Vehicles Rules (hereinafter, "Motor Vehicle Sales Rule"), and fraud.

The first jury trial was set for January 13, 1986. Defendant Wheels, Inc. dismissed its attorney on the morning of trial and

trial was continued over objection of plaintiff. Wheels obtained new counsel and trial was reset for April 15, 1986. Wheels, Inc. subsequently went out of business, leaving virtually no assets left.

Prior to the start of trial, defendant Chrysler Credit Corporation was bifurcated from the trial against Wheels, Inc. in recognition of the fact that its contractual position regarding the plaintiff would be determinable as a matter of law after trial on the merits against Wheels.

Moments before the commencement of the trial, Wheels' representative at trial and its counsel left, stating that since Wheels was insolvent that it would not oppose plaintiff's evidence at trial. A jury having already been summoned to hear the cause, the trial proceeded in defendant's absence.

At close of the evidence, the trial

court directed a verdict in favor of the plaintiff on all claims. The issue of damages was submitted to the jury. The jury returned a verdict for $5,000 actual damages and $750,000 punitive damages. The trial court subsequently awarded the plaintiff treble actual damages as allowed under Ohio Revised Code Section (herein O.R.C.) 1345.09 (See Appendix VIII) for the Consumer Act violation for a total of $15,000 and statutory damages of $200 per violation for the remaining three Consumer Act violations for a total of $600, making the plaintiff's award $771,200 (which included previous sanctions in the amount of $600 against defendant Wheels for abuse of the discovery process).

The trial court succinctly stated the next issue in its July 29, 1987 Opinion:

> "The issue now before us is Hardeman's liability, if any, on this unpaid balance to Chrysler Credit Corp., who is the assignee of the

> retail installment note between Hardeman and Wheels. * * * We determine that Chrysler is not a holder in due course of the retail installment loan."

Argument was subsequently had on the federal question: to what extent the $771,200 judgment would be held against Chrysler Credit, as holder of the plaintiff's $13,995.40 retail installment sales contract involved in the case.

The trial court held that (1) Plaintiff's actual damages ($5,000) would be a claim that could be set off against her obligation to pay Chrysler Credit under the contract, (2) the statutory minimum damages under R.C. Section 1345.09 (here $200 for each of three violations) would be a claim that could be set off against the contract, (3) plaintiff's punitive damage verdict ($750,000) could <u>not</u> be used as a claim that could be set off against her obligation to pay Chrysler Credit under the contract, (4)

the Consumer Act's trebled actual damages ($15,000) could not be used as a claim for set off against the Chrysler Credit contract and (5) monetary sanctions (of $600) for Wheels' discovery abuse during litigation could not be used as a claim for set off against the Chrysler Credit contract. Plaintiff subsequently appealed the decision of the trial court on the third and fourth prong, based upon the trial court's erroneous interpretation of 16 C.F.R. 433.2, the Preservation of Rights Notice.

Before filing her appeal plaintiff applied for attorney fees of $80 per hour for out of court time and $125 per hour for in court time (a total of $7,695) and cost of $1,681.48 under R.C. Section 1345.09.

The trial court allowed only $1750 for attorney fees and $888.50 for costs and held that none of that judgment amount could be used as a setoff against the plaintiff's

Chrysler Credit finance contract obligation, thus developing the Petitioner's second error in its interpretation of 16 C.F.R. 433.2. The Petitioner appealed to the Twelfth District Court of Appeals of Ohio, which subsequently affirmed the trial court's decision. See Appendix II. Petitioner attempted to invoke her rights to the Supreme Court of Ohio, which denied the petition in a split decision. See Appendices III and IV.

The final judgment of Twelfth District Court of Appeals is the judgment Petitioner is thus appealing to the United States Supreme Court.

ARGUMENT

The problem faced by Petitioner, and creditors and consumers alike throughout the country is to what extent setoff will be allowed on a retail installment sales

contract. The case law is unclear. One finds the state court decisions are different on this issue throughout the country. The F.T.C. has been silent on this issue and the states have subjectively decided the limits. A more stable standard is required, keeping within the intent of the legislation.

First Proposition of Law

WHERE IS RETAIL INSTALLMENT CONTRACT CONTAINS A "PRESERVATION OF RIGHTS" CLAUSE, THE DEBTOR'S JUDGMENT AGAINST THE SELLER OF GOODS UNDER THE NOTE CAN BE USED AS A SETOFF AGAINST THE BALANCE OWED BY THE DEBTOR TO THE ASSIGNEE OF THE CONTRACT.

A. The clear language of the "Preservation of Rights" clause dictates that all claims can be asserted against the assignee of a consumer credit contract.

This issue is one of first impression: what are the inclusions and exclusions of the claims and defenses allowed to be set

off, and how will a court interpret these rights contained in consumer credit contracts as required by the Federal Trade Commission and how will the court define the liability of the consumer-buyer to the assignee and holder of the contract when the buyer has a judgment against the seller-assignor of the contract?

The clause under discussion here is mandated by Federal Trade Commission Regulation to be placed on every consumer credit contract involving what has come to be called "Seller Financing". It is required to be in 10 point type by 16 C.F.R. 433.2(A), and must state:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OR GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The consumer credit contract between the parties at bar contains the required language, which is quite simple and straight forward. When the language is clear and unambiguous on its face, judicial interpretation is not required; rather the court must give effect to the words as they are used. Dougherty v. Torrence, 10 O.S.3d. 140 (1984).

Not only are certain rights created by application of the F.T.C. Rule, but implementation of the Rule necessarily imposes certain contract rights and obligations on the transaction between the parties.

It was the insolvency of the primary defendant (the seller-assignor, Wheels herein) that gives rise to this issue. This issue is of critical importance to consumers, sellers, and third-party financiers across the country.

The effect of plaintiff's judgment (against Wheels) upon Chrysler Credit can best be analyzed by the language of the "Preservation of Rights" clause itself. The clause specifically states "all claims and defenses". Nothing could be clearer.

B. Where the debtor's judgment exceeds the balance on a retail installment sales contract, which contains a "Preservation of Rights" clause, the debtor can obtain a refund of amounts paid the holder of the contract and cancel the balance owed on the contract.

The F.T.C.-mandated Notice required by 16 C.F.R. 433.2 is colloquially referred to as the "Preservation of Rights" Clause. The effect of this Rule has been noted by at least one treatise to be that,

> Consumers may cease making payments when sellers break their contracts, may set off their claims against the amount owed under the

> contract, and may also assert a right to recover monies paid on account. II Federal Trade Commission, Section 19.08, p. 19-30 (Kanwit; pub: Shepard's McGraw-Hill, 1985).

Under a simple and clear interpretation of the FTC Rule, and by the express language of the agreement itself, Chrysler Credit's installment contract is subject to all of Petitioner's claims and defenses, including, Consumer Act violations, U.C.C. violations, and fraud. Some state courts have refused to so find, such has the state court of appeals below.

In fact, under the F.T.C. Rule alone, Petitioner can recover all the payments she previously made to Chrysler Credit, using the precise application of the last sentence of the Rule's clause.

The history of the F.T.C. Rule dramatically states the public policy and purpose of limiting remedies or holders of

consumer credit contracts:

> The Commission believes that it is an unfair practice for a seller to employ procedures in the course of arranging the financing of a consumer sale which separates the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised.

Our primary concern, in the course of these proceedings, has been the distribution or allocation of costs occasioned by seller misconduct in credit sales transactions. These costs arise from breaches of contract, breaches of warranty, misrepresentation, and even fraud. The current commercial system which enables sellers and creditors to divorce a consumer's obligation to pay for goods and services from the seller's obligation to perform as promised allocates all these costs to the consumer/buyer. Consumers are generally not in a position to evaluate the likelihood of seller misconduct in a particular transaction. Misconduct costs are not incorporated into the price of the goods or services, nor are they reflected in any deferred payment price or unpaid balance of a sales related loan. Seller misconduct costs are thus externalized in a way that renders many sales finance transactions inherently deceptive and consumers are also compelled to bear the costs occasioned by the misconduct of another, while the "guilty" party avoids liability, we

believe that reliance on contractual foreclosure of equities in consumer transactions constitutes an unfair practice under Section Five of the F.T.C. Act.

In announcing this rule, we are pursuing our statutory mandate to identify and prevent unfair or deceptive practices in the marketplace. This authority has been analogized by the United States Supreme Court to the jurisdiction of a commercial equity court. We have thus weighed competing equities in the marketplace in reaching our conclusion that the mechanical abrogation of consumer claims and defenses is unfair to consumers. We conclude that a consumer's duty to pay for goods or services must not be separated from a seller's duty to perform as promised, regardless of the manner in which payment is made. In reaching this conclusion we note thousands of instances, documents in the record of this proceeding, where the separation of what are substantial injury to consumers. The common sense shock articulated by many of the consumer witnesses upon learning that their duty to repay a creditor was totally unrelated to their seller's promises is perhaps the clearest and most direct evidence of the injurious and distorted impact of the challenged practices. Promulgation of the Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed.Reg. 53522-53523 (1975) (emphasis added).

C. Case law in Ohio supports preservation and setoff of claims under consumer contracts against the assignee of the contract under the "Preservation of Rights" clause mandated by the F.T.C. Rule.

Courts in Ohio, and elsewhere, have recognized the validity of claim preservation in consumer finance contracts and allowed a debtor to assert any claim or defense against the assignee that could have been asserted against the seller. E.g., Cox v. First National Bank of Cincinnati (S.D. Ohio 1986), 633 F. Supp. 239; General Motors Acceptance Corp. v. Grady (1985), 27 Ohio App.3d 324; Provident Bank v. Barnhart (1982), 3 Ohio App.3d 318.

Cox was a Truth In Lending case between a consumer and an assignee of the finance contract in a consumer transaction under 15

U.S.C. 1614 et seq., where the Court held the assignee of the finance contract liable for the seller's violation of the Truth In Lending Act.

As noted in Cox,

> Ohio courts have recognized the validity of such claim preservation provisions in consumer credit contracts, and allowed debtors to assert any claim or defense against the assignee of the contract that could have been asserted against the seller. [citations omitted] 633 F.Supp. 236, at 239.

The District Court then went on to note that the claim in Cox would be applicable against the assignee-creditor, First National Bank, including the right of rescission of the contract. Id., at 240.

The Summit County Court of Appeals of Ohio has also examined the "Preservation of Rights" clause in the case of General Motors Acceptance Corp. v. Grady, supra.

In Grady the buyer of a defective automobile, who had paid money down and made one payment prior to suit, notified the seller that she was revoking the sale. The financier, GMAC, which had already taken the retail installment sales contract on assignment, treated the vehicle as a repossession and sued the buyer on the resulting deficiency. The buyer then counterclaimed, based on the "Preservation of Rights" clause, and filed a third party complaint against the selling dealership.

The trial court rendered judgment against the buyer on the GMAC claim and against the seller on the third party counterclaim. Id., at 322. The court of appeals discussed the "Preservation of Rights" clause at 27 O.App.3d. 324 and properly noted,

> Therefore, by both contract and statute, any claims or defenses which the debtor could assert against the seller are also valid defenses

> against the holder of the installment agreement. Any loss resulting to GMAC as a result of a successful claim or defense asserted by Grady may be recovered by GMAC from Thompson in the appropriate action.
>
> All of the parties to the suit below being before this court, we exercise our authority to modify the judgment of the trial court to bring said judgment in alignment with the principles set out above. App. R. 12(B). 27 O.App.3d, at 324-325.

The Court of Appeals reversed the judgment against Grady, and entered judgment against the financier in favor of Grady based on the defense of breach of contract by the seller, finding that the same is also a valid defense against the holder of the note, GMAC, and dismissed the GMAC suit against the buyer, Grady. Id., at 325.

Furthermore, Chrysler Credit's parent corporation, Chrysler Corporation, is no stranger to litigation under the "Preservation of Rights" clause, as seen by

Provident Bank v. Barnhart, supra.

In that case, Barnhart purchased a defective new car from a Chrysler dealer, who assigned the finance contract to Provident Bank. To cure the defects, the dealer substituted a new vehicle and agreed to pay the consumer's obligation to the bank on the old vehicle, while financing the new vehicle itself for the consumer. However, the dealer then became insolvent and the bank sued Barnhart on the note. The buyer counterclaimed and filed third party complaints against Chrysler, the dealer and the owner of the dealership.

The bank was granted summary judgment on its note against Barnhart, in spite of her attempt to assert her claims and defenses which she had against the dealer and against the bank.

The Hamilton County Court of Appeals discussion begins at 3 O.App.3d 318, and

explained the history of 16 C.F.R. 433.2 in depth, and concludes by finding the summary judgment in favor of the bank to be error in light of the alleged claims and defenses which the buyer was never allowed to assert.

D. Case law of other states also supports Petitioner's right to set off the balance due under the consumer contract, by application of the F.T.C. Rule.

In Thomas v. Ford Motor Credit Co., 48 Md.App.617, 429 A.2d 287 (C.A. Md. 1981), the consumer brought an action directly against the financier of the sale for breach of contract and fraud. The court in Thomas held, inter alia, that (1) the retail installment contract was not negotiable paper, but nothing more than an assignable contract; and (2) the Preservation of Rights Notice on the contract (a) was intended to

tie together the consumer's duty to pay with the seller's duty to fulfill its obligations, and (b) causes the contract to become a conditional promise to pay. The court also stated,

> Furthermore, if the appellants can prove the allegations of direct participation by the appellee [holder of the note] in the fraud, they are not limited in their recovery of punitive damages to the amounts paid under the contract. Id., at 624.

A case directly on point with the present action is a Texas appellate court case where a consumer purchased a defective swimming pool from a pool retailer who assigned the finance contract to a third party. Cooper v. Republicbank Garland, 696 S.W.2d 629 (1985). The contract was breached by the seller, who became insolvent and the Court held plaintiff's judgment to be a setoff against the financier under the contractual provisions of the F.T.C. Notice in the finance contract.

In the case of Drew v. Chrysler Credit Corporation, 596 F.Supp. 1371 (W.D. Missouri, 1984), the buyers of a new automobile brought suit in state court alleging that the finance company wrongfully repossessed the automobile. The District Court held that the buyers of the new automobile were allowed to setoff claims against the assignee, the finance company, because of the insolvency of the dealer. The court stated that "a statute should be constituted to avoid imposing impossible, impractical and futile conduct". Id. at 1374. This is exactly what the Court of Appeals for the Twelfth District of Ohio did not do. Their decision denying any setoff for punitive damages, attorney fees and cost undermines the clearly stated intent of the Federal Trade Commission's Rule.

In the situation faced by petitioner, she became prey to a fraudulent dealer who

went insolvent and now is faced with a judgment which the Ohio courts will not enforce against a financier contrary to the intent of the F.T.C. Rule. The Florida Supreme Court warned that this type of burden on finance companies may require some changes in business methods. But said the court,

> "the finance company is better able to bear the risks of a dealer's insolvency than the buyer and on a far better position to protect his interest against inscrupulous and insolent dealers." Martin 63 So.2d 649, 653 (Fla. 1953).

There is a dispute among state courts as to the extent that they will hold financers liable under 16 C.F.R. 433 et seq. for a judgment against an insolvent seller whose sale they financed. The appropriate standard should be to allow the consumer to set off the judgment against amounts owed or already paid to the financer under the

contract.

Second Proposition of Law

WHERE A RETAIL INSTALLMENT SALES CONTRACT CONTAINS A "PRESERVATION of RIGHTS" CLAUSE, THE DEBTOR'S JUDGMENT AGAINST THE SELLER OF GOODS UNDER THE NOTE, FOR ATTORNEY FEES AND COSTS, CAN BE USED AS A CLAIM FOR A SET OFF AGAINST THE BALANCE DUE TO THE ASSIGNEE UNDER THE CONTRACT.

Since no case law exists, the intent of the F.T.C. Rule, and logic and equity, must dictate the answer to this issue.

Both Wheels, Inc. and Chrysler Credit participated in defense of the plaintiff's case all the way up to moments before the second trail date. Chrysler Credit was bifurcated from the trial and then reappeared to contest the application of the judgment to it under the "Preservation of

Rights" clause.

Looking specifically to this case, it is readily apparent that Chrysler Credit has filed motions and memoranda subsequent to the trial and will do so on this appeal, the result of which is to require the plaintiff herein to incur substantial additional attorney fees, caused solely by assertion of her rights against Chrysler Credit.

Logic and equity dictate that where the statute provides for the payment of reasonable attorney fees, the party responsible for causing the plaintiff to incur the attorney fees should become the party responsible for payment of said fees. Where that party shares the burden with another, they should both be jointly and severally liable therefore.

In its Opinion on the attorney fee question, even the trial court admitted that,

> "[w]e recognize that a literal application of the language required to be put on such installment loan notes by the F.T.C. could very well pass attorney fees on to the lending institution. However, we interpret the language which allows the consumer to use "all claims and defenses" he has against the supplier to be used in turn against the assignee of the installment note, to be restricted to compensatory and concomitant equitable "claims and defenses". (emphasis added).

Clearly, this is error and should have been recognized as such by the Ohio Appeals Court.

As such, Chrysler Credit should be held liable for the plaintiff's attorney fees in accord with the F.T.C. Rule, or in the alternative, should be held liable for the fees it has caused the plaintiff to incur in further prosecuting this action.

Were the law otherwise, a financier, such as Chrysler Credit here, could litigate a consumer into submission; again, such a proposition is the opposite of the clear

intent and the clear language of the Preservation of Rights Clause itself.

CONCLUSION

The burden of seller misconduct should not be borne by the innocent consumer who is in no position to evaluate such misconduct. It is of great importance that the Justices of the United States Supreme Court establish a uniform standard of interpretation of 16 C.F.R. 433.2, the Preservation of Rights Clause.

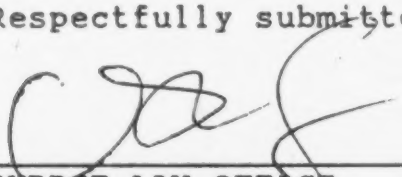
This Court needs to pronounce the law to be that Petitioner herein is entitled to a total offset of her judgment, including attorney fees and costs in their full measure, against the retail installment sales contract involved.

Every consumer, financier and retail seller in this country needs the guidance that only the United States Supreme Court

can give on these important issues.

The decision of the Appeals Court of the Twelfth District of the State of Ohio should be reversed and remanded for further findings in accord with the law.

Respectfully submitted,



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Certification of Service

I hereby certify that three copies of the foregoing were served upon Charles H. Tobias, Jr., Attorney for Chrysler Credit Corp., 2208 Central Trust Tower, Cincinnati, Ohio 45202, by ordinary mail on this 11th day of July, 1989.

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APPENDIX I

A-2

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

LORI HARDEMAN,	:	CASE NO. CV85-05-0498
PLAINTIFF,	:	
-VS-	:	
WHEELS, INC. AND CHRYSLER CREDIT CORP.,	:	OPINION
DEFENDANTS	:	

: : : : : : :

MOSER, J.

On April 27, 1985, plaintiff, Hardeman, purchased a car from the defendant, Wheels, Inc. The facts as testified to by Hardeman (defendant offered no testimony) were that she agreed to pay the amount stated on the federal "window sticker" $7,559.00. Hardeman also agreed to pay an additional $500.00 for a warranty which Wheels told her she had to pay, and Wheels offered her $3,750.00 on her trade-in as part of the deal.

Hardeman subsequently signed financing papers for the car payments at Wheels. Hardeman stated she was not told the length of, nor terms of, the financing agreement.

Wheels then sold the financing agreement, or retail installment loan, to defendant Chrysler Credit Corp. (Chrysler).

Prior to Hardeman paying her first payment, she discovered several discrepancies between what she and Wheels had agreed upon and what was written into the retail installment loan. She immediately returned to Wheels and told them about the discrepancies which they refused to rectify.

Hardeman, on her own, then through her attorney, tried several times to solve the problems with Wheels. Chrysler was notified of the problems prior to Hardeman's first payment.

She had discovered that Wheels charged

her $9,823.00, which was in excess of the agreed price; that the $500.00 warranty was from a private company and was not necessary because the standard Chrysler warranty covered the car for five years; and that she had received only $3,250.00 for her trade-in.

When negotiations failed to rectify these discrepancies, Hardeman filed suit against Wheels and Chrysler.

At a jury trial, directed verdicts were given to plaintiff on her claims for breach of contract and warranties; Ohio Consumer Sales Practices Act (CSPA) claims for breach of contract and warranty, charging an excessive price, violations of Advertisement and Sale of Motor Vehicles Rule, O.A.C. 109:4-3-16 (CSPA); fraud, deceit and misrepresentations and the Price Comparison Rule, O.A.C. 109:4-3-12 (CSPA).

The remaining issue for the jury was on

damages. They found in plaintiff's favor: $5,000.00 in actual damages, $600.00 representing $200.00 statutory damages for each of three CSPA violations, and $750.00 in punitive damages.

Defendant Wheels was able to pay only $1,185.00 of the judgment due to insolvency.

Hardeman, prior to trial, made eleven of sixty payments of $209.09 per payment. It had been agreed that she would suspend her payments subsequent to trial and pending a decision on her ultimate liability. She has paid a total of $2,299.99, which leaves a balance of $10,245.41 unpaid. The issue now before us is Hardeman's liability, if any, on this unpaid balance to Chrysler Credit Corp., who is the assignee of the retail installment note between Hardeman and Wheels.

The amount of Chrysler's liability depends upon its status as assignee: Is it

a holder or holder in due course, and can punitive damages assessed against Wheels, in turn be assessed against Chrysler?

We determine that Chrysler is not a holder in due course of the retail installment loan.

Included in the loan to Hardeman was the Federal Trade Commission required notice (FTC rule):

NOTICE

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED [PURSUANT HERETO OR] WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

This clause is required to be inserted in all consumer credit contracts. 16 C.F.R. Sec. 433 (1984).

The FTC rule places all assignees or holders of the loan on notice that any defenses and claims that are good against

the seller will be good against the holder. Therefore, the holder will not be a holder in due course and the loan carries none of the benefits of negotiability. R.C. 1317.03.1 Editor's Analysis of FTC rule: Provident Bank v.s Barnhart, (1982), 3 Ohio App.3d 316, 445 N.E. 2d 746; Cooper vs. Republicbank Garland, (1985), 696 S.W. 2d 629 (Tex. App.); Thomas vs. Ford Motor Credit Co., (1981), 48 Md.App. 617, 429 A. 2d 277.

Thus, Chrysler, as assignee of the retail installment loan, would stand in the shoes of Wheels in matters relating to the installment loan.

Based on violations of CSPA and common law claims for breach of contract and fraud, the jury found Wheels liable for $5,000.00 in actual damages, $600.00 for three additional violations of CSPA, and $750,000.00 in punitive damages.

The actual damages and the three $200.00 statutory damage amounts ($600.00) were awarded to Hardeman pursuant to the CSPA for separate violations. R.C. 1345.09(B); Freitag Bill Swad Datsun, (1981), 3 Ohio App. 3d 83. Revised Code 1345.09(B) also provides as a matter of law that where actual damages are found to exist, they shall be trebled. For this treatment judgment was granted to Hardeman for $15,000.00 following the jury's finding of $5,000.00 actual damages.

In most instances, this total judgment may simply be passed on to the culpable merchant, however, in the matter sub judice, Wheels (the merchant) was nearly insolvent and therefore unable to pay the judgment.

We not must look to Chrysler, the assignee-holder of the installment note, for its ultimate liability, we must consider:

(1) Chrysler's liability for the

$5,000.00 actual damages;

(2) Chrysler's liability for treble damages, thereby increasing the $5,000.00 by $10,000.00;

(3) Chrysler's liability for punitive damages in the amount of $750,000.00; and,

(4) Chrysler's liability for the three statutory violations at $200.00 for each for a total of $600.00.

Initially we conclude that the $5,000.00 in actual damages may be used as an offset on the installment note held by Chrysler. These damages may be used to offset payments made as well as those to be made on the loan. Smith vs. Fulton, (1935) 51 Ohio App. 12. Offsets up to the total amount of the loan have been allowed in other states with laws similar to R.C. Chapter 1345. Cooper vs. Republicbank Garland. (1985) 6 S.W. 2d 629 (Tex. App.); Thomas vs. Ford Motor Credit Co., (1981), 48 Md. App. 617, 429

A.2d 177 (the limitation on the amount of recovery did not preclude the debtor from stating a claim against the holder even though no payments had been made); 6A C.J.S. Assignments Sec. 95, p. 752 (an assignee cannot be held beyond the scope of the contract). See also the language in FTC rule.

As previously stated R.C. Sec. 1345.09(B) allows for the recovery of three times the actual damages for violations of Chapter 1345, which in our matter adds $10,000.00 to the Hardeman judgment. Treble damages are puntive and are provided to prevent or discourage certain activity. French vs. Dwiggins, (1984), 9 Ohio St. 3d 32. The award of treble damages contain compensatory and punitive components in a ratio of one to two. Roberts and Martz, Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions -

the Ohio Consumer Sales Practice Act, 42 Ohio St. L.J. 927, 955 - 956.

Therefore, two-thirds of a treble damage award is punitive. It has been admitted by plaintiff that Chrysler is involved only because it financed the car. There was no allegation or showing that Chrysler acted with malice or intent. We therefore ask ourselves if in equity and justice we should punish Chrysler for the culpability of Wheels. We answer that in the negative, and conclude that the $10,000.00 of the $15,000.00 judgment, cannot be used as a setoff on the installment note. (1)

We now address the punitive damage award of $750,000.00. Common law punitive damages may not be awarded in an action for fraud without, among other elements, the showing of an intent to mislead. Clayton vs. McCary, (1976) 426 F. Supp. 248 (N.D. Ohio). Even where a salesman's representations did

not evince a malicious, wanton, or gross fraud, punitive damages will not lie. Logsdon vs. Graham Ford Co. (1978), 54 Ohio St. 2d 336. As stated above, it has been admitted by plaintiff that Chrysler is involved only for having financed the car. Therefore Chrysler has acted without malice or intent and is not liable for punitive damages for fraud.

In addition, punitive damages are not awarded in pure breach of contract actions involving breach of warranty claims. Tibbs v. National Homes Construction Co. (1977) 52 Ohio App. 2d 281; Thomas v. Ford Motor Credit Co., (1981) 48 Md. App. 617, 429 A.2d 177.

---

(1) No authorities were found or cited by the parties which allowed statutory punitive damages to be used against an assignee-holder of a contract.

A contract action will only support punitive damages where there is willful, wanton, and malicious conduct on behalf of the defendant. Sweet v. Grange Mutual Insurance Co., (1971) 50 Ohio App. 2d 401; Kird v. Safeco Insurance Co. (1970) Ohio Misc. 44. We also note that punitive damages are not imputed to a principal (employer from employee) or to a municipality in the absence of scope of authority or ratification of the acts giving rise to punitive damages. Trauth v. Dunbar (1983) 5 Ohio St. 3d 68; Drain v. Kosydar (1978) 54 Ohio St. 2d 49. It would therefore appear that both the Courts and public policy would dictate that only the guilty be punished and that we not impute guilt to an innocent third party. In addition, R.C. 1345.09 does not have a punitive damage clause beyond the treble damage provision. Therefore, we conclude that Chrysler is not liable in any

way on the award of $750,000.00 in punitive damages.

Finally, we make one last observation regarding punitive type damages under the CSPA. We are not willing to impute to an innocent assignee-holder of a contract the onerous burden of paying a potentially extensive statutory and common law punitive award rendered against a culpable merchant. Plaintiff obviously argues to the contrary saying the financier of the transaction should overlook the habits of its merchant-customers and if the merchant-customer goes astray of the CSPA then the financing organization should pay. This Court does not believe the legislature intended to appoint the holders of credit-paper as watchdogs over its customers. Denying these holders the advantage of being a holder in due course is penalty enough for their failure of having accepted business from

less than the most ethical of merchants.

We now dispose of the liability issue on the three statutory $200.00 awards. This $600.00 was awarded to plaintiff on CSPA violations in lieu of actual damages. The legislative policy supporting this statutory award is to punish an "act" of a merchant even when it results in no damages.

Since we did conclude that an award of actual damages constituted a proper claim or defense against an installment loan note held by an assignee-holder, we likewise conclude that a statutory award in lieu of actual damages should receive the same treatment. We come to this conclusion notwithstanding the fact that the legislative scheme in permitting such an award was to "punish" and to "deter" such activity. We are aware that we have found quite to the contrary on the treble damage and punitive damage issue which were both

also designed to deter or punish conduct. These punitive awards, however, are in the nature of additions to actual damages, while the statutory $200.00 amounts are in lieu of actual damages. In addition, if we fail to allow a consumer to offset an installment note in the hands of an assignee-holder with a statutory $200.00 awards, such consumer may end up without any compensation for the CSPA violations of the merchant. In these circumstances the public policy mandated by the legislature by passage of the CSPA would be totally thwarted.

Our plaintiff, Hardeman, has retained possession of the automobile during the pendency of this litigation and we find that there's no requirement that Hardeman return the car, since there was no judgment to rescind the contract. Reichart v. Ingersoll (1985) 18 Ohio St. 3d 220. Therefore, Hardeman may retain the car and use the

$5600.00 to offset part of the $10,245.41 that she still owes on the car. We also find it to be only equitable that there shall be no acceleration of payments solely due to any delays in payments during the pendency of this matter.

Finally, the Court during the process of the discovery proceedings and as a result of a motion to compel answers to interrogatories filed by the plaintiff, imposed a monetary sanction of $200.00 upon the defendant Wheels. This sanction was punitive in nature and directed personally at Wheels. We therefore refuse to impute this award to defendant Chrysler.

Plaintiff is directed to prepare an Order of Judgment reflecting this opinion.

/S/ J. Moser
John R. Moser, Judge

cc: Stanley Morgenstern
Thomas Humbach
Charles H. Tobias, Jr.

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

LORI HARDEMAN, : CASE NO. CV85-05-0498

PLAINTIFF, :

-VS- : OPINION

WHEELS, INC., ET AL:

DEFENDANTS :

: : : : : : :

MOSER, J.

This matter is before the Court on the plaintiff's motion for an award of attorney fees and expenses.

R.C. 1349.09(F) provides that an award of reasonable attorney fees may be made to the consumer when the "supplier has knowingly committed an act or practice that violates this chapter."

We must therefore first determine whether or not Wheels, Inc. "knowingly" committed an act or practice that was either unfair, deceptive or unconscionable.

Some Courts have held that a supplier must "knowingly" violate an act which he knows to be in violation of the Consume Sales Practice Act. See Bierlein vs. Alex's Continental Inn, Inc. (1984) 16 Ohio Appeals 3d 294; and Gaylen vs. Towell Cadillac, Inc., (1984) 15 Ohio Misc. 2d 1. Other courts, including the 12th District Court of Appeals, states that a supplier must only "knowingly" commit an act which happens to be a violation of Chapter 1345. The 12th District Court of Appeals acknowledged that one can knowingly do an act without knowing that the act is in violation of las, but nevertheless the very commission of the act will justify an award of attorney fees so long as the act is done knowingly. See Brooks vs. Hurst Buick, Pontiac, Olds, GMC, Inc. (1985) 23 Ohio App. 3d 85. Therefore, we are constrained to follow the law of the 12th District and we do determine that

Wheels, Inc. did "knowingly" commit acts which were in violation of the Consumer Sales Practice Act. (A jury has already made this determination). However, we also find that while the acts were committed knowingly, Wheels did not commit the acts knowing them to be a violation of the CSPA. Counsel for the plaintiff herein has made an application for attorney fees based upon 60.25 hours for time on this mater up through August 11, 1987. This amounts to a claim for $7,695.00 for attorney fees. Counsel also requests reimbursement for expenses in this matter totalling $4,681.48.

We recognize that R.C. 1345.09 states that the Court "may award" attorney fees in a matter under Chapter 1345. In other words the award is discretionary. It has apparently been the philosophy of the legislature and many courts that attorney fees should be awarded to victorious

consumers on two levels: (1) on the individual level to enable the inured plaintiff to pursue his own claim; and (2) on the public level to reimburse the individual plaintiff and his counsel for enforcing the Act on behalf of the general citizenry. See Paul Fire and Marine Insurance Co. vs. Updgrave (1983, Wash.) 656 P. 2d 1130.

This Court understands this consumer protectionist philosophy and we are prepared to invoke it. Nevertheless it is not our philosophy to spawn the inception of lawsuits when the Consumer Sales practice Act violations have been technical or have not risen to a sufficient level as to raise the eyebrows or passions of the average consumer advocate. The allowance of attorney fees, or at least substantial attorney fees, would certainly give rise to a spate of lawsuits which we would

categorize as being based upon "mere technicalities." We do not believe it was the intent of the legislature to punish every "act" of a supplier which fell within the purview of the Consumer Sales Practice Act. If this were so,t his Court is of the opinion that every purchaser of a car could sue his car dealer, conduct discovery, and thereupon find Consume Sales Practice Act violations. It is not our purpose to promote such litigation simply because counsel can seek his attorney fees and expenses from the supplier.

In the matter before us we have considered the time and effort which Mr. Burdge has spent on this matter and we have likewise determined that there was an inordinate amount of time and effort devoted to a lawsuit of this type and magnitude. The size of the verdict in no way exemplifies the magnitude of the case

inasmuch as this lawsuit was not defended in the courtroom. We have also taken into consideration DR2-106 (B) Code of Professional Responsibility which provides the guideline for fees. We are likewise taking into consideration that this litigation originated and was tried in a small midwestern town by an attorney from a still smaller midwestern town where lower attorney fees are anticipated due to the lower cost of doing business. We well recognize that many law firms in large cities have an overhead of seventy percent while single practitioners in small law firms from small cities have overhead as low as twenty-five percent.

Accordingly we adjust the attorney fees to $1750.00 and expenses to $888.50 which amount includes court costs.

An additional issue in this case is whether or not these attorney fees and

expenses can be used by the plaintiff to offset any remaining balance due and owing to Chrysler Credit Corporation who purchased her retail installment note executed to Wheels, Inc. by the plaintiff. Previously we determined that punitive damages and treble damages could not be utilized to offset any balance due and owing on the retail installment note.

Generally the payment of attorney fees to the prevailing party, even upon a written agreement, has been held to be against Ohio's longstanding public policy. See State vs. Taylor (1841), 10 Ohio 378, and its progeny. It has been held by our Ohio courts that "the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation." Worth vs. Aetna Casualty Assurety Company, 32 Ohio St. 3d

238, 242. We find that an award of attorney fees has generally not been recognized by the common law of Ohio and has been declared against public policy except where there is an award of punitive damages. therefore when we do award attorney fees we do it pursuant to statutory authority, as in the matter sub judice. When we do grant a statutory allowance of attorney fees, vis a vis a general public policy in opposition to this philosophy, we must draw a fine line.1 Drawing such a line proscribes any "shading" which is required if we extend a supplier's requirement to pay fees to a requirement that those fees be passed onto the financier who may have purchased the promissory notes from the supplier. We recognize that plaintiff's counsel asserts that such a

_____ 1. See Nottingdale Homeowners Association vs. Darby, 33 Ohio St. 3d 32, decided 10-14-87

purchaser of retail installment paper has a responsibility to oversee his assignors, nevertheless such a lender has no opportunity to cure the defects of the supplier's products, to effect repairs, nor to reprimand offending employees. We have already concluded that the assignment of attorney fees acts as a penalty. Are we to penalize the purchaser of retail installment paper? Absence a showing of collusion or pattern of CSPA violations over a period of time which the finance company by its actions or inactions knowingly condones or encourages, we can hardly assess the penalty against the finance company.

Chrysler Credit was not the "supplier" in this matter, nor by extending credit were they involved in effecting or soliciting consumer transactions. See Brown vs. Willard (1977) 5 O.O. 3d 95, wherein the Court dismissed two separate finance

companies from that action stating that they were not suppliers notwithstanding the fact that they furnished promissory note forms to certain health spas so that membership contracts could be sold or assigned to the defendant-lenders.

Plaintiff's counsel maintains that Chrysler Credit is not a holder in due course of the promissory note executed by Lori Hardeman, and that Chrysler takes the note subject to "claims and defenses" which Lori Hardeman, our plaintiff, may have in this matter.

We recognize that a literal application of the language required to be put on such installment loan notes by the FTC could very well pass attorney fees on to the lending institution. However, we interpret the language which allows the consumer to use "all claims and defenses" he has against the supplier to be used in turn against the

assignee of the installment note, to be restricted to compensatory and concomitant equitable "claims and defenses." We specifically reject any claim or defense which encompasses penalties intended to be assessed against the supplier for wrong doing.

The assessment of attorney fees have always been associated with punishment for purposes of deterring a future similar activity. Chrysler Credit Corporation is not responsible for any acts which should be the object of deterrents, therefore it would be eminently unfair to pass attorney fees onto such an installment note-holder. We recognize that, like in the matter sub judice, where the supplier (Wheels) is insolvent, there is no one left to pay attorney fees. It is particularly in these instances a consumer should register his complaint with the office of the attorney

general where an action may be initiated under R.C. 1345.06 and R.C. 1345.07 on behalf of the consume and all those similarly situated.

A judgment entry may be drawn up by counsel reflecting the foregoing opinion.

/S/ J. Moser
John R. Moser, Judge

cc: Ron Burdge
Charles Tobias
Thomas Humbach
Stanley Morganstern

APPENDIX II

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY, OHIO

LORI HARDEMAN,	:	CASE NO. CA88-02-017
	:	
Plaintiff-Appellant	:	MEMORANDUM DECISION
	:	AND
- vs -	:	JUDGMENT ENTRY
	:	
WHEELS, INC., et al.	:	12-27-88
	:	
Defendants-Appellees	:	

Burdge & Associates, Ronald L. Burdge, P.O. Box 651, Franklin, Ohio 45005, for plaintiff-appellant.

Steer, Strauss, White & Tobias, Charles H. Tobias, Jr., 2208 Central trust Tower, Cincinnati, Ohio 45202, for defendant-appellee, Chrysler Credit Corp.

Morgenstern & McAdams Co., L.P.A., Stanley Morganstern, One Public Square, Suite 800, Cleveland, Ohio 44113, for defendant-appellee, Wheels, Inc.

Per Curiam. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers

from the Butler county Court of Common Pleas, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App. R. 12(A) as follows:

On April 27, 1985, plaintiff-appellant, Lori Hardeman, purchased an automobile from defendant-appellee, Wheels, Inc., ("Wheels"). Hardeman signed financing papers but was not informed of either the length or terms of the agreement. Wheels subsequently sold Hardeman's loan to defendant-appellee, Chrysler credit Corp. ("Chrysler").

Before she made any payments on the contract, Hardeman discovered that Wheels had charged her in excess of the agreed upon sticker price, that Wheels has

induced her into purchasing a $500 warranty she did not need, and that she received less than the agreed upon amount for a trade-in on a used automobile.

Hardeman notified Chrysler of these problems and when negotiations failed, Hardeman filed suit against Wheels and Chrysler. Prior to trial, Hardeman paid $2,299.99 on the contract, leaving an unpaid balance of $10,245.41 due to Chrysler.

During trial before a jury, the trial court granted Hardeman directed verdicts on her following claims: breach of contract and warranties; violations of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq.; fraud, deceit and misrepresentation.

The issue of damages was submitted to the jury which found Wheels liable for

$5,000 actual damages for breach of contract, fraud and violations of the CSPA. The jury further found that Wheels had committed three statutory violations of the CSPA for which Hardeman was entitled to $200 for each violation. Hardeman was awarded treble damages on both the actual damages and the CSPA statutory violations. The jury also awarded punitive damages of $750,000. The trial court issued a judgment entry in favor of Hardeman for $771,200.

Because Wheels was insolvent, it could pay only $1,185 towards the judgment. Hardeman subsequently sought to set off the judgment against the amount she owed Chrysler. Hardeman also sought a determination of Chrysler's liability regarding her judgment against Wheels.

In opinion dated July 29, 1987, the

trial court ruled that Chrysler, as the assignee of the contract, was not a holder in due course and that Hardeman could set off both the actual damages and statutory damages totaling $5,600 from the balance she owed Chrysler. On the other hand, the court held that neither the treble damages nor punitive damages were subject to a set off.

Hardeman subsequently filed a motion for attorney fees and expenses, requesting $7,695 in attorney fees and $1,681,48 in expenses. The trial court awarded fees of $1,750 ad expenses of $888.50 and ruled that neither could be set off against the balance owed Chrysler.

Hardeman appeals and submits the following assignments of error for review:

First Assignment of Error

"The trial court erred to the

prejudice of plaintiff-appellant in its findings that plaintiff's judgment against defendant Wheels, Inc. may not be entirely used to set off the amount owed by the plaintiff to defendant Chrysler Credit Corporation on its retail installment sales contract."

Second Assignment of Error

"The trial court abused its discretion in awarding attorney fees under R.C. 1345.09 in the amount of $1,750.00 where plaintiff's attorney was forced to spend more than 83 hours preparing a case for two different trial dates, report conferences with the trial court, pretrial conferences with the trial court, pretrial motions, discovery, motions to compel discovery, and preparation of testimony and testimony of an expert witness, an actual trial, post trial motions and memorandum and hearings."

Third Assignment of Error

"The trial court erred to the prejudice of plaintiff-appellant in its findings that plaintiff's attorney fee and costs judgment against defendant Wheels, Inc. is not

> a `claim' that may be used to setoff the amount owed by the plaintiff to defendant Chrysler Credit Corporation on its retail installment sales contract."

For her first assignment of error, Hardeman argues that she should be permitted to set off the full amount of her judgment against the balance she owes on the contract to Chrysler. Hardeman claims that since Chrysler is not a holder in due course, it is subject to all claims and defenses which she could assert against Wheels.

Hardeman's contract with Wheels contained the following language:

"NOTICE"

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVER HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." (Emphasis added.)

This language is required by a trade regulation rule promulgated by the Federal Trade Commission which effectively banned the utilization of the holder in due course doctrine in consumer credit cases. See Section 433.2(a), Title 16 C.F.R. The issue to be decided in this assignment of error is whether the phrase "all claims" as used in Section 433.2(a), Title 16, C.F.R. encompasses Hardeman's claims for punitive and treble damages in addition to actual damages. Hardeman argues that the anti-holder in due course provisions of the federal regulation entitles her to set off the entire $771,200 judgment she obtained against Wheels against the amount she still owes Chrysler under the contract.

One commentator has observed that the purpose of Section 433.2, Title 16, C.F.R.

is:

> "*** [B]ased on [a] simple public policy determination: as between an innocent consumer and a third party financier, the latter is generally in a vastly superior position (1) to return the cost to the seller, where it properly belongs, (2) to exert an influence over the behavior of the seller in the first place, and (3) to the extent the [financier] cannot return the cost (as in the case of fly-by-night dealers), to `internalize' the cost by spreading it among all consumers as an increase in the price of credit."

Fonesca, 2 Handling Consumer Credit Cases 703, Section 24:1 (3rd Ed. 1987). See, also, Provident Bank v. Barnhart (1982), 3 Ohio App. 3d 316, fn. 3. Thus, the holder of a retail installment contract assigned under such a notice pursuant to the federal regulation, is subject to any claim or defense the debtor could assert against the original seller of the goods,

provided the claim or defense is one arising out of or connected with the original transaction. Barnhart, supra.

Section 433.2, Title 16, C.F.R. precludes the separation of the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised. Fonesca, supra.

In Thomas v. Ford Motor Credit Co. (1981), 48 Md. App. 617, 429 A. 2d 277, a Maryland Court of Appeals held that the assignee of a contract containing the language of the federal regulation can be sued directly by the debtor. However, the regulation's final sentence limits the debtor's recovery to amounts paid by the debtor under the contract. Id. Thus, although the regulation limits the amount of the recovery, it does not preclude the debtor from asserting a claim against the

holder of the contract. Id.

Hardeman asserts that since the regulation subjects Chrysler to all "claims," she may set off or deduct all damages, including the treble damages and punitive damages, since they are claims which she has against Wheels resulting from Wheels' breach of contract.

The trial court permitted Hardeman to deduct or set off her actual damages but not the treble damages or punitive damages. Treble damages awarded under the CSPA are punitive and designed to prevent or discourage certain activities or misconduct. French v. Dwiggins (1984), 9 Ohio St. 3d 32. In addition, since punitive damages are assessed as punishment and not compensation, a positive element of conscious wrongdoing is always required. Preston v. Murty

(1987), 32 Ohio St. 3d 334.

We agree with the trial court that Chrysler should not be punished for the culpability of Wheels to the extent that Chrysler should be held accountable for such damages of a purely punitive nature. There is obviously no wrongdoing or misconduct on the part of Chrysler in the case at bar. The onerous burden of paying a potentially extensive statutory and common law punitive award rendered against a culpable merchant should not be imputed to an innocent assignee of the contract. It is enough that these holders such as Chrysler are denied the advantage of being a holder in due course and are subject to any actual and compensatory damages suffered by the innocent purchaser. This is penalty enough for accepting business from dishonest merchants.

We conclude that the trial court did not err in denying Hardeman's request to set off the treble and punitive damages against Chrysler. The first assignment of error is therefore overruled.

In her second assignment of error, Hardeman claims that the trial court abused its discretion by not awarding the full amount of attorney fees and expenses Hardeman requested under the CSPA.

R.C. 1345.09 provides that a violation of the CSPA entitles a consumer to, among other things, the following relief:

> "(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either the following apply:
>
> "***
>
> "(2) The supplier has knowingly committed an act or practice that violates this chapter."

In construing R.C. 1345.09, we held in

Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc. (1985), 23 Ohio App. 3d 85, that the statute calls for the award of a "reasonable" attorney's fee. In reviewing such an award, we further noted that:

> "It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere. The trial judge which participated not only in the trial but also in many of the preliminary proceedings leading up to trial has an infinitely better opportunity to determine the value of services rendered by lawyers who have tried a case beforehand than does an appellate court."

Id. , at 91. In exercising its discretion in the award of such fees and expenses, the trial court may make an award based upon the actual value of the necessary services. See,

Bierlien v. Alex's Continental Inn, Inc. (1984), 16 Ohio App. 3d 294.

We have reviewed the record and Hardeman's motion for fees and expenses. We cannot say that the trial court abused its discretion by not granting the requested fees. The trial court was obviously in a better position to determine what actual services were necessary in the case at bar and their reasonable value. The amount awarded by the trial court is neither so low nor so high as to warrant or justify our interference with their decision.

Having found no abuse of discretion, we therefore conclude that the second assignment of error is without merit and is accordingly overruled.

In her final assignment of error, Hardeman submits that the attorney fees

and costs are "claims" under Section 433.2, Title 16, C.F.R. which she may set off against the balance owed to Chrysler under the contract.

The federal regulation permits the injured party to assert all claims against the holder or assignee of an installment loan contract. It is Hardeman's position that equity should permit her to set off her attorney fees and expenses as such a claim. The provisions of R.C. 1345.09 permit the award of attorney fees against a supplier who knowingly violates the CSPA. Brooks, supra. Chrysler clearly was not the supplier in this matter nor was it involved in effecting or soliciting consumer transactions. Chrysler is

clearly subject to Hardeman's claims for actual and statutory damages designed to compensate the injured party. However, Chrysler should not be subject to claims or defenses which encompass penalties specifically designed to be assessed against the supplier, rather than the assignee, for the supplier's statutory or common law infractions. We find no error in the trial court's refusal to grant Hardeman's request to set off the attorney fees and costs against Chrysler's claim for the balance of the contract.

The third assignment of error is hereby overruled.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the

same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by her counsel, excepts.

JONES, P.J. HENDERICKSON and YOUNG, JJ., concur.

Butler CA88-02-017

To The Clerk:
Enter upon the journal of the court an Order of the Court.

By /S/ Fred E. Jones
Presiding Judge

APPENDIX III

IN THE BUTLER COUNTY COURT OF APPEALS, OHIO
TWELFTH APPELLATE DISTRICT

LORI HARDEMAN,	) CASE NO. CA88-02-017
	)
Plaintiff-Appellant	)
	)
- vs -	)
	)
WHEELS, INC., et al.	)
	)
Defendants-Appellees	)

NOTICE OF APPEAL

Plaintiff-appellant hereby gives notice to appeal to the Supreme Court of Ohio from the decision and judgment of the Court of Appeals of Butler county, Twelfth Appellate District, Ohio, rendered on December 27, 1988, on January 3, 1989, affirming the judgment of the Common Pleas Court of Butler County, Ohio

Plaintiff-appellant asserts that this case presents questions of great public and general interest.

/S/Ronald L. Burdge
Burdge & Associates
CO., LPA, by:
RONALD L. BURDGE
Attorney for Plaintiff
P.O. Box 651
Franklin, Ohio 45005
Telephone: 513-746-2404

CERTIFICATION

I hereby certify that a copy of the foregoing was served upon Charles H. Tobias, Jr., Attorney for Defendant Chrysler Credit Corporation, 2008 Central Trust Tower, Cincinnati, Ohio 45202; by ordinary U.S. mail on this _____ day of January, 1989.

RONALD L. BURDGE
Attorney for Plaintiff

APPENDIX IV

IN THE SUPREME COURT OF OHIO

1989 TERM

To wit: April 12, 1989

LORI HARDEMAN,	:	CASE NO. 89-351
Appellant,	:	
	:	E N T R Y
v.	:	
WHEELS, INC., et al.	:	
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Butler County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Burdge & Associates.

(Court of Appeals No. CA88-2-17)

/S/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX V

Section 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by wit of certiorari where the validity of a treaty or statute of the United States is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch 646, Section 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, Section 172(a)(1), 84 Stat. 590; June 27, 1988, P.L. 100-352, Section 3, 102 Stat. 662.)

APPENDIX VI

Section 433.2 Preservation of consumers' claims and defenses, unfair or deceptive acts or practices.

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold fact, type:

NOTICE

ANY HOLDER OR THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or,

(b) Accept as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold fact, type:

A-59

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER

[40 FR 53505, Nov. 18, 1975; 40 FR 58131, Dec. 15, 1975]

APPENDIX VII

Section 1345.09 Consumer's relief; intervention by attorney general; attorney's fee

For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02 or 1345.03 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover his damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(C) In any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(D) Any consumer ma seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or class action under this section, the clerk of court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in any private action or appeal pending under this section. When a judgment becomes final, the clerk of court shall mail a copy of the judgment including supporting opinions to the attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

HISTORY: 1978 H 681, eff 8-11-78
1972 H 103

Supreme Court, U.S.
F I L E D
AUG 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LORI S. HARDEMAN,

Petitioner,

vs.

CHRYSLER CREDIT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For The Twelfth District, Butler County

---

BRIEF OF RESPONDENTS IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Does the Federal Trade Commission prescribed language in 16 C.F.R. 433.2 contemplate as a "claim" which a debtor can assert against an innocent holder of a consumer credit contract, punitive damages assessed to punish the seller?

2. Where state law allows attorneys' fees to a prevailing party only if the opposing party is found to be in bad faith, does the Federal Trade Commission prescribed language in 16 C.F.R. 433.2 contemplate as a "claim" which a debtor can assert aganst an innocent holder of a consumer credit contract, an award of such fees assessed against the seller?

PARTIES

Petitoner is an individual, Lori Hardeman, and Respondent is Chrysler Credit Corporation, a Delaware corporation.

RULE 28.1 STATEMENT

Respondent is a wholly owned subsidiary of Chrysler Financial Corporation which is a wholly owned subsidiary of Chrysler Corporation. Respondent's affiliates are Chrysler Insurance Company and Chrysler Life Insurance Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

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Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For The Twelfth District, Butler County

---

BRIEF OF RESPONDENTS IN OPPOSITION

I.

COUNTERSTATEMENT OF THE CASE

The Federal Trade Commission has defined as an unfair or deceptive act or practice the failure of a seller to take or receive a consumer credit contract which fails to contain the following provision in at least 10 point bold face type:

NOTICE

> Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof; recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

Respondent purchased a consumer credit contract which **did** contain this language in compliance with the Federal Trade Commission regulation. The trial court herein as well as the Ohio Court of Appeals held that the "claims" contemplated by this language did not include punitive damages and/or attorneys' fees awarded against a seller by a court or jury to punish the seller for its wrongdoing, where the holder (respondent) in no way participated in such wrongdoing. Petitioner cites no case in point where a court has interpreted whether such punitive damages constitute the type of "claim" intended by the Federal Trade Commission rule. Apparently, this issue is not a hot one; there is no conflict in that regard and, therefore, no particular reason for this Court to assume jurisdiction to review what is essentially a local decision based on local law.

II.

ARGUMENT

A. The Petition for a Writ of Certiorari should be denied because the Ohio Court of Appeals correctly decided the issue herein.

It must first be emphasized to the Court that the jury in the instant case, although they found in favor of the plaintiff, found that as a result of the actions of Wheels, Inc., the seller of the vehicle involved, the plaintiff was damaged to the extent of only $5,000.00. To that extent, a setoff against respondent has been allowed by the courts below in accordance with the contractual language included in the contract to comply with the Federal Trade Commission rule.

Petitioner, at page 22-23 of her brief, cites the Commission's comment in conjunction with the promulgation of the rule at issue. Included in this language is the following:

> Our primary concern in the course of these proceedings has been the distribution or allocation of *costs* occasioned by seller misconduct in credit sales transactions. . . . We conclude that a consumer's duty to pay for goods or services must not be separated from a seller's duty to perform as promised. (Emphasis Supplied).

It is thus apparent that the intent of the Federal Trade Commission was to hold a consumer harmless from losses arising out of seller misconduct. There was no intent to preserve for the consumer as a claim or setoff against an innocent holder, the essential windfall of punitive damages. These have no relationship to the consumer's "costs" but are intended to deter a wrongdoer from repeating its acts.

Respondent in no way disputes the appropriateness of the public policy which allowed petitioner to set off $5,000.00 against respondent's claim against her. However, in no case cited by petitioner has it appeared that damages of a punitive nature were allowed as such a setoff. The case of *General*

Motors Acceptance Corp. v. *Grady*, (1985) 27 Ohio App.3d 324, did not involve punitive damages.

The case of *Thomas* v. *Ford Motor Credit Co.*, 48 Md. App. 617, 429 A.2d 287 (C.A. Md. 1981), specifically held that only "if the appellants can prove the allegations of direct participation by the appellee [holder of the note] in the fraud" may they have a setoff of punitive damages against the amount otherwise due the holder. In the instant case, there is no allegation or even implication that respondent, Chrysler Credit Corporation, was involved in any fraud or wrongdoing. Similarly, in the other cases cited by petitioner, although courts allowed a setoff under the FTC rule relative to actual out of pocket costs or damages to the consumer, in no instance were punitive awards against the wrongdoing seller allowed as a setoff against an innocent holder.

The same arguments apply relative to a setoff of attorneys' fees.

As pointed out by the Ohio Court of Appeals (p. A-46, petitioner's brief), the provisions of Ohio Revised Code 1345.09 permit the award of attorneys' fees against a supplier only if it "knowingly" violates the Ohio Consumer Practices Act (p. A-62, petitioner's brief), and as stated in *State ex rel. Kabatek* v. *Stackhouse*, (1983) 6 Ohio St.3d 55, 451 N.E.2d 248:

> The general rule in Ohio is that absent a statutory provision allowing attorneys' fees . . . the prevailing party is not entitled to an award of attorneys' fees unless the party against whom the fees are taxed was found to be in bad faith.

Thus, it is apparent that in Ohio an award of attorneys' fees is in the nature of punitive damages and the Court of Appeals was thus correct in not allowing them as a setoff against an innocent holder who in no way participated in the action of the seller sought to be punished.

Obviously, having succeeded in the lower courts in the assertion of its position that punitive damages are not allowed

as a setoff under these circumstances, there is no reason why Chrysler Credit Corporation should be held liable for the plaintiff's attorneys' fees in prosecuting that unsuccessful claim.

B. The Petition for a Writ of Certiorari should be denied because there is no issue involved of any national importance.

Petitioner states at page 17 of her brief that "one finds the state court decisions are different on this issue throughout the country. The FTC has been silent on this issue."

Although we agree that the FTC has been silent upon the issue, we cannot agree that state court decisions are different on the issue. As a matter of fact, we can find no decision of any state court which directly considered and decided the issue one way or the other. The cases cited by petitioner clearly establish the rule that judgments for damages defining the extent to which consumers have incurred costs and losses arising out of the actions of the seller of a consumer product, have been properly set off against the holder of sales contracts. The law which these cases establish has been applied in the instant case since the $5,000.00 in damages (as well as $600.00 which the lower court allowed "in lieu of damages;" p. A-16, petitoner's brief) have been set off to reduce respondent's claim against petitioner. The intent and philosophy of the Federal Trade Commission in promulgating 16 C.F.R. 433.2 has been fully implemented by the decision below. It appears that the issue involved in this case has been seldom, if ever, litigated on a nationwide basis. On the record, therefore, it appears that the outcome of this case will be of interest only to the parties and does not justify the intervention of the Supreme Court of the United States.

III.

CONCLUSION

The cost to petitioner of the misconduct of the seller in this case has already been borne by respondent. There is no justifiable reason, nor did the Federal Trade Commission intend, that the burden of a punishment levied against a wrongdoing seller, which has no dollar relationship to the out of pocket damages to the consumer, be assessed against an innocent holder. The decisions of the lower courts are correct under Ohio law. There are no cited decisions elsewhere to the contrary indicating that the issues in this case are of such national importance that the Supreme Court should consider them. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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